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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

**ALEXIOS KAFATOS,
individually and on behalf of all
others similarly situated**

Plaintiffs,

V.

UBER TECHNOLOGIES, INC.,

Defendant.

Case No.: 3:15-CV-03727-JST

**PLAINTIFF ALEXIOS KAFATOS'
OPPOSITION TO DEFENDANT
UBER TECHNOLOGIES, INC.'S
MOTION FOR STAY OF
PROCEEDINGS**

DATE: December 24, 2015
TIME: 2:00 p.m.
COURTROOM: 9

HON. JON S. TIGAR

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Without a solid argument addressing the relevant issues in this case,
 4 Defendant Uber Technologies, Inc. (“Defendant”), asks this Court to delay a
 5 meritorious class action, and hold up the claims of thousands of individuals,
 6 premised on its speculation that the Supreme Court may rule in a manner which
 7 affects the procedural rights of putative class members involved in the case at bar.
 8 Let us not forget, Defendant is alleged to have been mass-texting thousands upon
 9 thousands of consumers, without consent, using an intrusive and obnoxious
 10 autodialer, in violation of the Telephone Consumer Protection Act *47. U.S.C. § 227 et seq.* (“TCPA”).^[1]^[2] Defendant hopes to avoid class-wide liability for these
 11 illegal activities entirely, premised on the slimmest of hopes that the Supreme Court
 12 and the United States Court of Appeals for the District of Columbia (“D.C. Court
 13 of Appeals”) rule in a manner that invalidates the class action mechanism, overturns
 14 a ruling (which is hardly novel) within the clear authority of the FCC under the
 15 *Chevron* test, and thereby allows a company to break the law without repercussions.
 16 It seems highly unlikely that the Supreme Court and the DC Court of Appeals will
 17 rule in such a manner, and it is also unclear how the case cited by Defendant would
 18 overlap in the case at bar. In short, Defendant has not demonstrated a substantial
 19 likelihood that the ruling in *Spokeo v. Robins*, 135 S. Ct. 1892 (2015), will affect
 20 the claims at issue in the case at bar. Defendant’s dubious hopes should not suspend
 21 the claims of the thousands of consumers whose rights it violated, and whose lives,
 22 time, and privacy, it unwantedly invaded.

23
 24
 25¹ The Supreme Court of the United States has previously observed such unrestricted
 26 telemarketing calls to be an “intrusive nuisance” and an “invasion of privacy.”
 27 *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012).

28² See *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009).
 (Interpreting text messages to suffice as “calls” within the meaning of the TCPA).

1 On November 11, 2015, Defendant lodged its Motion for Stay of Proceedings
2 against Plaintiff Alexios Kafatos (“Plaintiff”), pending a decision by the United
3 States Court of Appeals for the District of Columbia concerning petitions for review
4 of the Declaratory Ruling and Order issued by the Federal Communications
5 Commission (“FCC”) and a decision from the United States Supreme Court in
6 *Spokeo*. [ECF No. 25]³. Defendant argues that the Supreme Court’s decisions on
7 issues in this case “is expected to have significant and wide-reaching impact on
8 cases across the country, including this one” and the “seismic shift” in the law will
9 change the trajectory of Article III standing. [ECF No. 25, at p.1 ¶ 1]. However,
10 Defendant fails to properly identify how the legal issues in these cases bear on this
11 action and the prejudice that Plaintiff will suffer if Defendant’s motion is granted.
12 Indeed, a close inspection of the nuances of the FCC Order that are at issue in the
13 DC Circuit’s review reveal that none of these issues overlap with the case at bar.

14 First, Defendant glosses over the significant and facially apparent differences
15 inherent in the issues involved in the cases being heard by Supreme Court and their
16 relation to the case at bar. Simply put, *Spokeo* has no bearing on this case. *Spokeo*
17 asks whether a Plaintiff has standing if she has received no actual damages in a case
18 brought under the Fair Credit Reporting Act, but the Ninth Circuit has already
19 determined in a number of cases that a Plaintiff has standing to recover when no
20 actual damages are asserted in a case brought under the TCPA. The Ninth Circuit
21 determined in *Spokeo* that statutory damages result in an “injury in fact” that is
22 “actual or imminent, not conjectural or hypothetical”. *Robins v. Spokeo, Inc.*, 742
23 F.3d 409, 412 (9th Cir. 2014) cert. granted, 135 S. Ct. 1892, 191 L. Ed. 2d 762
24 (2015). Given that TCPA claims involve actual harm, i.e. invasion of privacy,
25 charges for text messages, and merely contain a statutory liquidated damages
26 provision to specify the floor and ceiling for assessing such actual damages, it seems

27
28³ See also ECF No. 25, at p.2 ¶ 1.

1 abundantly unlikely that the Supreme Court would (or could) rule in such a manner
 2 that would impact a consumer's private right of action under this important
 3 consumer protection statute. Defendant is simply playing fast and loose with these
 4 issues, to delay and stall the inevitable.

5 Second, the pending review by the DC Court of Appeals regarding the
 6 definition of "ATDS," "called party," "call," and the manner in which an individual
 7 can revoke consent have already been decided by United States District Courts
 8 (including Ninth Circuit Courts) and numerous Circuit Courts, all of which have
 9 ruled in unison with one another and with the FCC.

10 **II. FACTUAL BACKGROUND**

11 On August 10, 2015, Plaintiff filed this proposed class action against
 12 Defendant alleging that Defendant violated the TCPA by engaging in a widespread
 13 and systemic scheme to promotional mass texts to consumers on their cellular
 14 phones, using autodialer technology, without prior express consent. ECF. No. 1.
 15 Indeed, Plaintiff received numerous solicitation text messages from Defendant, to
 16 the point where he had to block the number. *Id.* at ¶ 11. It is facially obvious that
 17 the technology used to send Plaintiff the mass solicitation text messages at issue
 18 qualifies as an "automatic telephone dialing system," ("ATDS") as defined by 47
 19 U.S.C. § 227 (a)(1) as prohibited by 47 U.S.C. § 227 (b)(1)(A). *Id.* at ¶¶ 9-13. The
 20 proposed class includes all person within the U.S. who received any unsolicited text
 21 messages from Defendant without their prior express consent.⁴ ECF No. 1 ¶ 19.

22 Critically, for determination of this Motion, discovery has yet to commence,
 23 and this case is in its infancy, meaning that the "prejudice" cited by Defendant, i.e.
 24

25 ⁴ Plaintiff is unsure at this early stage, what Defendant's basis for texting him might
 26 be. Plaintiff only knows that he never subscribed to any services with Uber, nor
 27 visited its website. At this stage, it would be pure speculation, and premature to
 28 determine whether this is a recycled or reassigned number case, a case where a third
 party improperly provided Plaintiff's number to Defendant, or where Defendant is
 simply employing sloppy techniques for obtaining consent to auto-text consumers.

1 the risk of duplicative or unnecessary litigation, is highly unlikely to come to pass.

2 **III. LEGAL STANDARD**

3 The “power to stay proceedings is incidental to the power inherent in every
 4 court to control the disposition of the causes on its docket with economy of time
 5 and effort for itself, for counsel, and for litigations.” *Landis v. N. Am. Co.*, 299 U.S.
 6 248, 254 (1936). “[T]his can best be done...[by] weigh[ing] competing interests
 7 and maintain[ing] an even balance. *Id.* citing to *Kansas City Southern Ry. v. United*
 8 *States*, 282 U.S. 760, 763 (1931); and, *Enelow v. New York Life Ins. Co.*, 293 U.S.
 9 379, 382 (1935). Importantly, the Supreme Court imposed a heavy burden for a
 10 party moving for a stay of proceeding, stated that the moving party “must make a
 11 **clear case of hardship or inequity** in being required to go forward, if there is even
 12 a fair possibility that the stay for which he prays will work damage to someone
 13 else.” *Landis*, 299 U.S. at 255 (emphasis added). “Only in rare circumstances will
 14 a litigant in one cause be compelled to stand aside while a litigant in another settles
 15 the rule of law that will define the rights of both.” *Id.* Finally, the Supreme Court
 16 cautioned that due to the “likelihood or danger or abuse...there is no power by a
 17 stay to compel an unwilling litigant to wait upon the outcome of a controversy to
 18 which he is a stranger.” *Id.* at 256 citing to *Dolbeer v. Stout*, 139 N.Y. 486, 489, 34
 19 N.E. 1102, 1102 (1893); *Rosenberg v. Slotchin*, 181 A.D. 137, 138, 168 N.Y.S. 101,
 20 102 (App. Div. 1917); *Wadleigh v. Veazie*, 28 F. Cas. 1319, 1320 (C.C.D. Me.
 21 1838); *Checker Cab Mfg. Co. v. Checker Taxi Co.*, 26 F.2d 752 (N.D. Ill. 1928);
 22 and, *Jefferson Standard Life Ins. Co. v. Keeton*, 292 F. 53, 53 (4th Cir. 1923).

23 Further, “this Court must [sic] weigh the competing interests affected by the
 24 granting or denying [sic] a request for a stay,” in accordance with the standard set
 25 out by the Ninth Circuit in *Lockyer v. Migrant Corp.*, 398 F. 3d 1098, 1110 (9th
 26 Cir. 2005):

27 Citing Landis, we set out the following framework:

28 Where it is proposed that a pending proceeding be stayed, the
 competing interests which will be affected by the granting or refusal

1 to grant a stay must be weighed. Among those competing interests are
 2 the possible damage which may result from the granting of a stay, the
 3 hardship or inequity which a party may suffer in being required to go
 4 forward, and the orderly course of justice measured in terms of the
 simplifying or complicating of issues, proof, and questions of law
 which could be expected to result from a stay.

5 “The District Court has broad discretion to stay proceedings as an incident to
 6 its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997).
 7 Here, this Court should exercise its broad discretion and deny Defendant’s Motion,
 8 since the current action is not one of the “rare circumstances” that warrant
 9 Defendant’s requested remedy, and Plaintiffs’ interests in effectively adjudicating
 10 the case at hand on its merits outweighs any potential competing interests of the
 11 Defendant to stay the case.

12 **IV. ARGUMENT**

13 As discussed herein, Defendant’s Motion should be summarily denied.
 14 Defendant has failed to meet its burden of demonstrating that Plaintiffs’ interests in
 15 effectively adjudicating the case at hand on its merits is outweighed by the
 16 speculative competing interests of the Defendant that would be served by a stay.
 17 Further, and of critical import to the Court’s decision here, the United States
 18 Supreme Court case *Spokeo v. Robins* is inapplicable to the current action. Finally,
 19 Defendant’s reliance upon a decision by the DC Court of Appeals on various
 20 clarifications of the 2015 Report and Order is not only far too speculative to warrant
 21 a stay of the proceedings, but the issues being interpreted by the DC Court of
 22 Appeals has already been adjudicated. Defendant’s citations to other instances
 23 where the FCC has been overturned by the DC Court of Appeals is a red herring, as
 24 the issues present in the case at bar are not dependent upon the 2015 FCC Order.⁵
 25 For these reasons, as discussed in more detail below, Defendant’s Motion should

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 27 ⁵ *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991,*
 28 *Declaratory Ruling and Order, FCC 15-72, Released July 10, 2015, MCP No. 134*
 (July 24, 2015) (hereinafter “2015 FCC Order” or “Omnibus Order”)

1 be summarily denied.

2 **A. DEFENDANT FAILS TO MEET ITS HEAVY BURDEN OF**
 3 **DEMONSTRATING THAT ITS SPECULATIVE HARM OUTWEIGHS**
 4 **PLAINTIFF'S ACTUAL AND DEMONSTRABLE HARM CAUSED BY THE**
 5 **REQUESTED STAY.**

6 Defendant acknowledges that *Landis v. North American Co.*, 299 U.S. 248
 7 (1936) is the lens through which this analysis is filtered without any explanation as
 8 to the effect said filter has on the analysis of this decision. ECF No. 25 at p.11 ¶ 4.
 9 However, Defendant failed to include in its Motion a discussion of any of the
 10 principles, rationale or guidance from *Landis*. *Landis* provided guidance to District
 11 Courts in ruling upon Motions for Stay Orders and observed that the analysis
 12 requires balancing the benefits of a stay with any hardship a stay may impose.
 13 Specifically, the Supreme Court stated:

14 [A party seeking] a stay must make a clear case of hardship or
 15 inequity in being required to go forward, if there is even a fair
 16 possibility that the stay for which he prays will work damage to
 17 someone else. Only in rare circumstances will a litigant in one
 18 cause be compelled to stand aside while a litigant in another
 19 settles the rule of law that will define the rights of both.

20 *Landis*, 299 U.S. at 255.

21 The *Landis* matter definitively holds that it is the defendant's burden to "make
 22 a clear case of hardship or inequity" absent a stay of proceedings. Defendant has
 23 failed to do so. Rather, Defendant's Motion is replete with speculation that
 24 Defendant could potentially suffer absent a stay of proceedings.

25 *i. Plaintiff and Putative Class Members Will Suffer Prejudice As A*
 26 *Result of A Stay*

27 Defendant states, without any legitimate basis, that Plaintiff will not suffer
 28 prejudice from a stay of proceedings; however this is simply untrue and Defendant
 29 uses misguided logic to arrive at this erroneous conclusion. Defendant is alleged to
 30 engage in widespread illegal telemarketing practices under the TCPA, whereby it
 31 solicits consumers on their telephones, using obnoxious, intrusive and invasive

1 automated autodialing technology, without their consent to do so. Plaintiff received
 2 the following text message:

3 Uber: Anaheim is closed tomorrow! Find us in Fountain Valley and
 4 Irvine instead for a FREE vehicle inspection and qualify for \$100 after
 5 10 trips. For info – t.uber.com/lavi

6 Because of the content of the message and its instructions for the consumer
 7 to visit Defendant's website, the text message is clearly a solicitation text. Further,
 8 due to the generic language contained therein, it is plausible to assume that this text
 message was widespread.⁶

9 Autodialing consumers, using a pre-arranged text message, to solicit products
 10 and services is the classic example of the type of unwanted activity expressly
 11 envisioned by Congress in passing the TCPA. *Mims v. Arrow Fin. Servs., LLC*, 132
 12 S. Ct. 740, 742-46 (2012). The Supreme Court has noted that such unrestricted
 13 telemarketing is an “intrusive nuisance” and an “invasion of privacy.” *Id.* Yet,
 14 Defendant fails to indicate to the Honorable Court in its Request for a Stay of
 15 proceedings, whether it has, or intends to materially alter its practices, despite being
 16 faced with a nationwide class action lawsuit.⁷ What is abundantly clear is that
 17 members of the putative class will continue to suffer the exact kind of damages at
 18 issue, during the pendency of the stay, and that Defendant will continue to profit by
 19 way of these allegedly illegal marketing practices, and gain an unfair competitive
 20 advantage over law-abiding competitors.

21 ⁶ A granting of Defendant's request for a stay on proceedings will permit Defendant
 22 to continue placing unwanted promotional text messages to consumers who have
 23 not provided consent, preventing Plaintiff from diligently furthering his duties as
 24 class representatives, which include swiftly seeking an injunction prohibiting such
 ongoing and harmful conduct.

25 ⁷ Defendant also fails to cite the case of *Ramirez v. Trans Union, LLC* 2015 WL
 26 6159942 (N.D. Cal. June 22, 2015), which relied heavily on the fact that the
 27 defendant there had demonstrated that it had taken further steps to alter its behavior
 28 and comply with the law, as an important factor in granting the Defendant's request
 for a stay. Since Defendant has made no such assurances to the Honorable Court,
 Plaintiff must be allowed to proceed diligently with his case.

What's more, Defendant fails to consider the prejudice that Plaintiff will suffer if the Stay is granted. Plaintiff will further suffer harm from a stay, resulting from lapse of time, memory of witnesses fading, and company turnover at Defendant's place of business, with regard to material witnesses.⁸ This issue is even more critical in the context of a class action, where due to the high volume of individuals involved, many of them will become more difficult to provide notice to or be in a position to receive the benefits of the action, due to lapse of time. To this, Defendant simply states that "by the time this motion for stay is fully briefed, the remaining time to disposition by the [DC Court of Appeals] is likely to be significantly less than a year," that "Plaintiff seeks primarily statutory damages and alleges no ongoing injury, therefore there is little urgency ... " and that Plaintiff will not suffer additional hardship pending a stay because "Defendant has blocked the phone number at issue from receiving additional text messages to ensure Plaintiff does not receive future text messages from Defendant." ECF No. 25 at p. 17 ¶¶ 1-3. However, these arguments miss the point. Class members and Plaintiff will be continuously burdened by the stress of a pending litigation until the matter can finally be decided. When weighing this heavy burden against Defendant's tenuous speculation (described below), the choice is clear.

Indeed, it is implausible to hold that time has *no* effect on the evidentiary course of a case. The question is a matter of degree. If the case, for example, were stayed for ten years, it would be clearly implausible for Defendant to make such an argument. Similarly, waiting until both *Spokeo* and the 2015 Report and Order are decided will have an effect on prejudicing Plaintiff and his case, the question is only a matter of how much. And, while the exact amount of prejudice at issue is difficult

⁸ Defendant's employee witnesses are likely to turn over, during the pendency of a Stay. New employees who were not involved in the original policies and procedures at issue in this case, will be subsequently tasked with becoming the persons most knowledgeable on complex issues, of which they have no firsthand knowledge.

1 to calculate, courts have long agreed that time will have an effect on evidence at
 2 trial.⁹ The salient issue is whether the supposed prejudice by Defendant outweighs
 3 the obvious prejudice involved with extending the time of any case. And, the
 4 Defendant has not met its burden in this case.

5 Further, Defendant's arguments that Plaintiff will not be prejudiced because
 6 Plaintiff claims "only statutory damages and alleges no ongoing injury" and he will
 7 not suffer additional hardships because Defendant blocked the telephone number is
 8 completely baseless and entirely ignores the class of people, whom Plaintiff
 9 represents, that will continue to suffer the harms described by Plaintiff. As
 10 previously mentioned, Defendant has not stated that it will cease its illegal activity.

11 Most importantly, as explained by the Ninth Circuit, stays "should not be
 12 granted unless it appears likely the other proceeding will be concluded within a
 13 reasonable time," *Dependable Highway v. Navigators, Inc.*, 498 F.3d 1059, 1066
 14 (9th Cir. 2007) *citing Leyva v. Certified Grocers of Calif., Ltd.*, 593 F.2d 857, 864
 15 (9th Cir. 1979). Notably, Defendant has provided no valid argument to show that
 16 the timeframe in question is reasonable as discussed above. Defendant states that
 17 the Stay will lead to a "modest delay," yet in the same sentence affirms that the
 18 ruling is speculative by using the qualifier "likely" to state that the decision will be
 19 made in less than a year. ECF. No. 25 at p.2 ¶ 3. To assume that this issue is not
 20 time-sensitive is to improperly minimize the harm of the illegal activities and
 21 practices of Defendant. The Court must take this into consideration, when
 22 determining whether a Stay is appropriate here.

23 ii. *The Northern District has made it clear that the TCPA cases,
 24 which are in their infancy and where parties have yet to engage
 25 in discovery, should not be stayed premised on Spokeo*

26 ⁹ *Alltech, Inc. v. Cenzone Tech, Inc.*, 2007 WL 935516 at *2 (S.D. Cal. March 21,
 27 2007); *Fresenius Medical Care Holdings, Inc. v. Baxter Intern., Inc.*, 2007 WL
 28 1655625 at *5 (N.D. Cal. June 7, 2007); *Network Appliance Inc. v. Sun
 Microsystems Inc.*, 2008 WL 2168917 at *5 (N.D. Cal. May 23, 2008).

It must be highlighted that this case is in its infancy, and that the only real costs Defendant will incur between now and until its motion for class certification will be filed will be those associated with discovery, much of which is necessary for the adjudication of Plaintiff's individual claims regardless of how the DC Circuit and Supreme Court rule anyways. When weighing a minor amount of additional cost relating to the anticipated class certification discovery, against the kind of severe prejudice that will be suffered by class members and Plaintiff as a result of a stay on the proceedings, it is certainly not clear that the inequity tips against Defendant and mandates a stay.

As the Northern District observed in *Doe v. Selection.com*, 2015 WL 5853700 (N.D. Cal. Oct. 8, 2015), these harm described by Plaintiff above is amplified in a case which is early in the stages of litigation (as the case at bar). The *Doe* court crucially distinguished holdings in other cases involving a *Spokeo* stay motion, in a manner that is directly applicable to the case at bar. Specifically, the *Doe* court observed *Larson v. Trans Union, LLC*, No. 3:12-cv-05726-WHO 2015 WL 3945052 (N.D. Cal. June 26, 2015), wherein the Court tentatively granted class certification and where the brunt of discovery had already been completed. In *Larson*, Judge Orrick granted defendant's stay, primarily because he was ready to rule on class certification, and understood that his ruling could be overturned, depending on how *Spokeo* was ruled by the Supreme Court. He also cited challenges for Plaintiff in proving his own individual standing to bring the alleged claims. However, in *Doe*, Judge Orrick later distinguished his ruling in *Larson*, holding that because the *Doe* matter was in its infancy, and because the plaintiff had no issue proving individual standing for his claims, the harms asserted by Defendant were speculative and also unsubstantiated:

“this case is in its nascent development, whereas if I had not issued the stay in Larson, I would have ruled on class certification, summary judgment, and likely held the trial before Spokeo and Tyson Foods were decided. Because [the Defendant] has not shown that the

1 relevant competing interests favor a stay, its motion is DENIED”
 2 ...
 3

4 “Given that Doe can establish his own individual standing and
 5 proceed with his own individual claims irrespective of the ultimate
 6 impact of Spokeo and Tyson Foods, the only potentially unnecessary
 7 discovery here is class discovery. That will undoubtedly place some
 8 additional burden on [the defendant], but it has not shown that the
 9 additional burden is sufficient to justify staying this case, which could
 10 otherwise be delayed by almost nine months depending on the timing
 11 of the Court's rulings. With respect to class certification briefing, no
 12 matter the content of the decisions in Spokeo and Tyson Foods, the
 13 parties are unlikely to need to do more than submit supplemental
 14 briefs addressing the decisions and their impact on the class
 15 certification question here.” *Doe v Selection.com*, at *1 and *5.

16 The case at bar has only begun the discovery process, and in fact, no
 17 discovery has taken place and accordingly granting a stay here would be premature.
 18 Furthermore, Plaintiff individual standing and individual claims are not at issue in
 19 the case at bar. This case is a mirror image of *Doe*, a Northern District case, and a
 20 mirrored ruling is appropriate. Even on this basis alone, Defendant’s Motion should
 21 be denied in full.

22

23 **B. THE UNITED STATES SUPREME COURT CASE OF *SPOKEO V. ROBINS*
 24 AND THE DC COURT OF APPEAL’S REVIEW AND INTERPRETATION OF
 25 THE 2015 REPORT AND ORDER IS INAPPLICABLE TO THE CASE AT BAR**

26 While stays may be appropriate if resolution of issues in the other proceeding
 27 could assist in resolving the current proceeding, Defendant has not met its burden of
 28 showing how the ruling from the United States Supreme Court or the D.C. Court of
 Appeal could have any bearing upon, or relation to, the matter at hand. *See Lockyer
 v. Mirant Corp.*, 398 F.3d 1098, 1110-1111 (9th Cir. 2005) *citing to CMAX, Inc. v.
 Hall*, 300 F.2d 265, 269 (9th Cir. 1962).

29 Defendant asserts that this action should be stayed since the United States
 30 Supreme Court granted a Writ of Certiorari in *Spokeo v. Robins*, Case No. 13-1339.
 31 ECF. No. 25, p.2 ¶ 1. In so arguing, Defendant ignores the inherent differences
 32

1 between *Spokeo* and the case at bar. Further, it is equally unclear whether the
2 Supreme Court will decide the issues that Defendant wants decided, let alone decide
3 them in its favor, which courts have taken as a sufficient reason to deny a stay. *See*
4 *e.g. In re Target Corp. Customer Data Sec. Breach Litig.*, No. MDL 14-2522
5 PAM/JJK, 2015 WL 5432115, at *7 (D. Minn. Sept. 15, 2015).

6 Defendant also speciously concludes that this action should be stayed pending
7 a decision from the DC Court of Appeals concerning the petitions for review of the
8 2015 Report and Order. Defendant wishes to seek clarification on the definition on
9 an automated telephone dialing system (“ATDS”), the definition of the terms,
10 “called party,” “call,” and what it means for a consumer to revoke consent to be
11 called using an ATDS. However, these arguments provide a clear illustration of how
12 loose Defendant is glossing over the notion that similar issues are involved in all of
13 these cases and the case at bar. In fact, how these applicable statutory terms have
14 been affected and shaped by the 2015 FCC Order is not an issue in this case.
15 Defendant clearly never had Plaintiff’s consent to place calls to his phone, as he
16 never provided his phone number to Defendant. Courts throughout the country,
17 including throughout this circuit, have consistently held that only a person who is an
18 operator of a telephonic device, may provide consent to be called on their own
19 number. Furthermore the question of the “current” or “potential” capacity of a
20 dialing system, which is at issue in the CD Circuit case, is a question which does not
21 relate, in any way, to text message campaigns sent by automated means. Rather,
22 what the DC Circuit is reviewing is whether the FCC’s determination that a phone
23 call, placed manually, and routed through a predictive dialing system, where the
24 automated predictive dialing features have been deactivated, still qualifies as an
25 ATDS under the TCPA. These circumstances have nothing whatsoever to do with
26 the robo-texting devices used to send the automated texts to Plaintiff and other
27 similarly situated consumers. How the DC Circuit rules on the 2015 FCC Order will
28 have absolutely no impact on this case, whether it agrees with those in the defense

1 bar who challenge the FCC, or upholds the FCC's Order in its entirety. It will still
 2 be unlawful under the TCPA to use a robo-dialer to automatically send robo-texts to
 3 consumers' cell phones, without prior express consent. Defendant's citation to the
 4 D.C. Circuit's review of the 2015 FCC Order raises eyebrows.

5 Indeed, a closer examination of *Spokeo* and the 2015 Report and Order show
 6 that Defendant is simply grasping at straws to run the clock and make it more
 7 difficult for the Plaintiff to pursue his case before the evidence begins to stale. For
 8 these further reasons, Defendant's Motion should be denied.

9 i. **THE TERMS DEFENDANT WISHES TO BE CLARIFIED BY THE DC
 10 COURT OF APPEALS WITH RESPECT TO THE 2015 REPORT AND
 11 ORDER HAVE ALREADY BEEN DECIDED, AND THE 2015 FCC
 12 ORDER IS HARDLY GROUNDBREAKING OR NOVEL**

13 Defendant's primary basis for its Motion to Stay is premised on guidance it
 14 believes will be given, on the applicable scope of the FCC's 2015 Order, which it
 15 incorrectly argues could impact the merits of the case at bar.¹⁰

16 In fact, the merits of the issues of which Defendant seeks guidance, as applied
 17 to the case at bar, have already been defined by Courts, by the FCC and by
 18 Congress. Defendant cites two issues, which are up for review by the D.C. Circuit
 19 Court of Appeals: 1) the definitions of "called party" and "call" under the TCPA,
 20 and as defined by the FCC in its 2015 Order, and 2) the scope of what type of
 21 technology constitutes an ATDS under the TCPA, insofar as whether this definition

22¹⁰ Defendant cites a slew of cases where the D.C. Circuit Court of Appeal has
 23 overturned portions of FCC Orders, yet none of these cases have anything to do
 24 with the TCPA. The brunt of these decisions relate to the Telecommunications and
 25 Television industries, and have nothing to do with the TCPA. Defendant's pages
 26 of citations are nothing more than a smoke screen. Plaintiff will attempt to cut
 27 through the fog, by acknowledging that the FCC has ruled, in separate contexts and
 28 under separate laws (not the TCPA), that the Agency has exceeded their *Chevron*
 authority. But these cases are of no moment in the case at bar, and Defendant's lack
 of analysis of the issues upon which its Motion are premised is telling.

1 encompasses technology which has dormant or deactivated “*potential capacity*” to
 2 automatically make telephone calls to numbers stored or produced using a random
 3 or sequential number generator. An analysis of the statutory framework, and
 4 current status of the law of each issue, described and analyzed in turn, reveal how
 5 thinly veiled Defendant’s arguments in fact are.

6 *a. “Called Party” and “Call” are consistently defined throughout the U.S.*

7 Congress, in drafting and passing the TCPA, made it unlawful “to make any
 8 call (other than a call made for emergency purposes or made with the prior express
 9 consent of the called party) using any automatic telephone dialing system or an
 10 artificial or prerecorded voice...to any telephone number assigned to a paging
 11 service, cellular telephone service, specialized mobile radio service, or other radio
 12 common carrier service, or any service for which the called party is charged for the
 13 call.” 47 U.S. Code § 227(b)(1)(A) (emphasis added). Nowhere in the TCPA
 14 statute, does the phrase “intended recipient” appear, and yet, Defendant’s basis for
 15 requesting that the Honorable Court hold up the claims of thousands of consumers,
 16 due to a pipe dream hope that the D.C. Circuit will create new law, that has been
 17 consistently rejected by Courts, by Congress, and by the FCC, defying all logic as
 18 well as the plain and unambiguous language of the TCPA statute itself. Such wild
 19 speculation cannot bar Plaintiff’s claims from proceeding.

20 The FCC ruled, in its 2015 Order, that the term “called party” referred to the
 21 subscriber of the phone at the time the call was placed, a concept which makes
 22 perfect logical sense, given that the statute is designed to protect the privacy of
 23 consumers from obnoxious robo-calls that they never consented to receive:

24 “We clarify that the fact that a consumer’s wireless number is in the
 25 contact list on another person’s wireless phone, standing alone, does
 26 not demonstrate consent to autodialed or prerecorded calls, including
 27 texts.” 2015 FCC Order at ¶ 48.
 28

...
 27

28 “We find that the “called party” is the subscriber, i.e., the consumer
 assigned the telephone number dialed and billed for the call, or the non-

1 subscriber customary user of a telephone number included in a family
 2 or business calling plan. Both such individuals can give prior express
 3 consent to be called at that number. Thus...calls to reassigned wireless
 4 numbers violate the TCPA when a previous subscriber, not the current
 subscriber or customary user, provided the prior express consent on
 which the call is based.” *Id.* at ¶ 73.

5 ...
 6 “We also reject CBA’s Petition and some commenters’ proposals that
 7 we interpret “called party” to be the “intended recipient” or “intended
 8 called party.” We agree with the Seventh¹¹ and Eleventh¹² circuits that
 9 the TCPA nowhere indicates that caller intent is relevant to the
 10 definition of “called party.” As described above, an “intended called
 11 party” standard does nothing to protect the new subscriber to a
 12 reassigned number. Second, “intended” is a subjective standard that
 13 would render enforcement difficult, if not impossible, because evidence
 14 of intent may not be objective or available (e.g., documents showing
 15 who the caller intended to call) and lies within the exclusive control of
 16 the caller. Moreover, interpreting “called party” to mean “intended
 17 party” is inconsistent with recent Commission decisions that the
 18 consent of one party cannot be binding on another; we recognize,
 19 however, that the consent of a customary user of a telephone number
 20 may bind the subscriber.” *Id.* at ¶ 78

Courts throughout the nation have consistently held identically to this ruling,
 i.e. that a third party who is not the current operator of a phone, and who does not
 possess common authority over the phone, cannot provide the requisite “prior
 express consent” to a calling party, on behalf of a telephone subscriber (i.e. the
 “called party”).¹³ What is clear from these cases, and their progeny, is that while it

¹¹ *Soppel v. Enhanced Recovery Co, LLC*, discussed *infra*.

¹² *Osorio v. State Farm Bank, F.S.B.*, discussed *infra*.

¹³ See *Gutierrez v. Barclays Grp.*, 2011 WL 579238, at *3–5 (S.D. Cal. Feb. 9, 2011) (the most cited case in the Ninth Circuit on this issue, where the court held that the “called party” was not the “intended recipient” but the actual recipient, and that only an individual with “common authority” over the “called party’s” telephone could provide prior express consent); *Soppel v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 640–41 (7th Cir.2012) (the most cited case in the nation on this issue, holding that “[t]he phrase ‘intended recipient’ does not appear anywhere in § 227, so what justification could there be for equating ‘called party’ with ‘intended recipient of the call?’” and observing that “the idea that one person can revoke

1 is true that the Ninth Circuit itself has yet to formally settle on a permanent
 2 definition of the term “called party,” it has been defined by numerous cases
 3 throughout this jurisdiction and the nation, and nearly every court agrees with the
 4 definition of “called party” that was adopted by the FCC in its 2015 Order. In short,
 5 Defendant has fabricated a dispute over the definition of “called party” from whole
 6 cloth, and its cries that the sky is falling on this issue will not come to pass.

7 Likewise, the term “call” has been decisively ruled upon by the Ninth Circuit,
 8 in a manner equally consistent with the FCC’s 2015 Order, and the 2003 Order,
 9 which Defendant perplexingly appears to now be arguing should be trotted back out
 10 despite being in full force and effect for the last twelve years. A text message is a
 11 call under the TCPA, and the law is abundantly clear on this issue.

12 The longstanding and most-cited case in the nation on the issue is *Satterfield*
 13 v. *Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009). There, the Ninth Circuit
 14 stated that “[w]hile the TCPA does not define “call,” the FCC has explicitly stated
 15 that the TCPA’s prohibition on ATDS “encompass both voice calls and text calls to
 16 wireless numbers including, for example, short message service (SMS) calls...”
 17 (Citing *In re Rules and Regulations Implementing the Telephone Consumer*
 18 *Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14115 (July 3, 2003)
 19 (“2003 Report and Order”). The court went onto discuss the FCC’s confirmation
 20 of the 2003 Report and Order, “The FCC ... confirmed that the “prohibition on
 21 using automatic telephone dialing systems to make calls to wireless phone numbers
 22 applies to text messages (e.g., phone-to-phone SMS), as well as voice calls.” In

23
 24 another’s consent is odd.”); *Olney v. Progressive Cas. Ins. Co.*, 993 F.Supp.2d 1220
 25 (S.D. Cal. 2014) (a case litigated by undersigned counsel, and strangely cited by
 26 Defendant, despite supporting Plaintiff’s position, which uphold and mirrors the
 27 rulings in *Soppet* and *Gutierrez*, and cuts against Defendant’s position); *Osorio v.*
State Farm Bank, F.S.B., 746 F.3d 1242 (11th Cir. 2014), (holding that called party
 28 does not mean intended recipient); *Davis v. Diversified Consultants, Inc.*, 36
 F.Supp.3d 217 (D.Mass. 2014) (same).

1 short, the Ninth Circuit relied on the 2003 FCC Order, which has been in effect for
 2 twelve years, in ruling that text messages were “calls” under the TCPA. The fact
 3 that the Defense Bar wants a gratuitous second bite at the apple, just because the
 4 FCC mentioned in the 2015 FCC Order that this was still the law, does not mean
 5 that the law will somehow be changed by the D.C. Circuit. Defendant must prove
 6 that there is a substantial probability the D.C. Circuit’s decision will impact this
 7 case. Defendant has failed to meet this burden, and its Motion should be denied.

8 ***b. The definition of ATDS, while in flux, clearly encompasses Defendant’s
 9 robo-text system, and this will not be affected by the D.C. Circuit’s ruling***

10 Congress, in drafting and passing the TCPA, defined the term “automatic
 11 telephone dialing system” means equipment to include any “equipment which has
 12 the capacity— (A) to store or produce telephone numbers to be called, using a
 13 random or sequential number generator; and (B) to dial such numbers.” 47 U.S.
 14 Code § 227(a)(1).¹⁴ This basic premise of law has not changed throughout the life
 15 span of the TCPA. What has changed is a question of whether the term “capacity”
 16 relates to “present capacity” or “potential capacity,” a distinction which Defendant
 17 correctly points out. However, Defendant fails entirely to describe or analyze how
 18 the question of present vs potential capacity might be triggered in the case at bar.
 19 Indeed, facially, it would appear that the distinction between potential and present
 20 capacity is not at issue here, as the texts sent to Plaintiff and other consumers were
 21 clearly sent using predictive dialing technology. This issue has long been settled in
 22 prior FCC rulings, dating back to 2003, where the FCC ruled that predictive dialers,
 23 which lack present capacity to automatically and sequentially dial stored numbers,
 24 still qualify as an ATDS under the TCPA. See 2003 FCC Order at ¶¶ 131-134.

25 ¹⁴ See also *McKenna v. Whispertext*, No. 5:14-cv-00424-PSG, *Order Granting*
 26 *Motion to Dismiss*, (N.D. Cal. 2015)(Reaffirming that an ATDS is defined as
 27 “equipment which has the capacity-(A) to store or produce telephone numbers to
 28 be called, using a random or sequential number generator; and (B) to dial such
 numbers. (Citing 47 U.S.C. § 227(a)(1)).

1 Even so, it is entirely premature to make this determination in any case, given that
 2 discovery is yet underway. Defendant's citations to the ATDS issue before the D.C.
 3 Circuit are factually inapplicable. A stay should not be imposed on this ground.

4 **i. THE UNITED STATES SUPREME COURT CASE OF *Spokeo v. Robins* IS INAPPLICABLE TO THE CASE AT BAR**

5 Finally, Defendant asserts that this action should be stayed since the United
 6 States Supreme Court granted a Writ of Certiorari in *Spokeo v. Robins*, Case No. 13-
 7 1339. ECF No. 25 p.2 ¶ 1. In so arguing, Defendant ignores the inherent differences
 8 between *Spokeo* and this matter. Specifically, *Spokeo* solely alleges violations of
 9 the Fair Credit Reporting Act and does not involve the TCPA. While stays may be
 10 appropriate if resolution of issues in the other proceeding could assist in resolving
 11 the current proceeding, Defendant has not explained how a ruling from the United
 12 States Supreme Court considering a drastically different statute has any bearing
 13 upon, or relation to, the matter at hand. *See Lockyer v. Mirant Corp.*, 398 F.3d 1098,
 14 1110-1111 (9th Cir. 2005) *citing to CMAX, Inc. v. Hall*, 300 F.2d 265, 269 (9th Cir.
 15 1962).

16 Of note, the Ninth Circuit found in *Spokeo* that a consumer pursuing liability
 17 for violations of the Fair Credit Reporting Act that did not allege any out of pocket
 18 loss still had standing in the U.S. District Courts, since the Legislature had created
 19 the award of statutory damages and intended such damages to be an injury for
 20 purposes of standing. In so ruling, the Ninth Circuit followed the principles from its
 21 2010 ruling in *Edwards v. First American Corp.*, 610 F.3d 514 (9th Cir. 2010) that
 22 found standing for a class-action that sought damages for violations of the Real
 23 Estate Settlement Procedures Act, even though the allegations did not allege any out
 24 of pocket loss by the consumers.

25 In this vein, courts have used existing precedent as a guideline, rather than
 26 speculate as to what the Supreme Court will do. *Woods v. Caremark PHC, L.L.C.*,
 27 No. 4:15-CV-00535-SRB, 2015 WL 6742124, at *3 (W.D. Mo. Nov. 2, 2015). And,

numerous courts in the Ninth Circuit repeatedly held that a consumer alleging violations of the TCPA may seek strictly statutory damages without the need to prove or even allege actual damages.

In enacting these consumer protection statutes Congress intended private actions to be the main vehicle for enforcement. *See S. Rep. No. 95-382 at 5 (1997); and, Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, 130 S. Ct. 1605, 1624 (referring to “the FDCPA’s calibrated scheme of statutory incentives to encourage self-enforcement”).¹⁵ As explained by the Ninth Circuit, statutory damages are available without proof of actual damages. *Baker v. G.C. Services Corp.*, 677 F.3d 775, 781 (9th Cir. 1982). *See also Rogers v. B-Real, L.L.C.*, 391 B.R. 317, 321-322 (2008) (“the FDCPA does not require proof of actual damages as a condition to the recovery of statutory damages; *Keele v. Wexler*, 149 F.3d 589, 593-594 (7th Cir. 1998) (the FDCPA “is blind when it comes to distinguishing between plaintiffs who have suffered actual damages and those who have not.”); and, *Bartlett v. Heibel*, 128 F.3d 497, 499 (7th Cir. 1997). Similarly, as described, the U.S. Supreme Court in *Mims* held that TCPA claims involve actual harm, i.e. invasion of privacy, and merely contain a statutory liquidated damages provision to specify the floor and ceiling for assessing such actual damages. It is unclear how the decision in *Spokeo* could invalidate the Supreme Court’s prior rulings about the actual harm caused to consumers through TCPA violations. Defendant does not delve into this issue, but instead merely speculates that *Spokeo* could impact the case at bar. This bald assertion is not enough to meet Defendant’s heavy burden of

¹⁵ The FDCPA (a similar statute to the TCPA with regard to its prescription of statutory damages) “permits and encourages parties who have suffered no loss [i.e., no actual damages] to bring civil actions for statutory damages.” *Jacobson v. Healthcare Fin. Servs., Inc.*, 516 F.3d 85, 91 (2d Cir. 2008). *See also Nelson v. Select Fin. Serv.s, Inc.*, 2006 WL 1672889 (E.D. Pa. 2006); *Phillips v. Amana Collection Serv.*, 1992 WL 227839 (W.D.N.Y 1992); *Diamond v Corcoran*, 1992 U.S. Dist. LEXIS 22793 (W.D. Mich. 1992).

1 persuasion.

2 In sum, Defendant's Motion curiously requests this Court to Stay Plaintiff's
3 action on the outside chance that the United States Supreme Court may issue a
4 decision unrelated to the question pending before it. Such a request should be
5 disregarded by this Court. In addition, the issue of whether a consumer may recover
6 statutory damages without asserting actual damages is clear and unambiguous. Thus,
7 Defendant's Motion should be denied.

8 **V. CONCLUSION**

9 Based upon the foregoing discussion, Plaintiff respectfully requests this
10 Court deny Defendant's Motion since the cases at issue examine an entirely
11 unrelated situation and a Stay would prejudice Plaintiff. Plaintiff's claims should
12 be allowed to proceed on track.

13 Dated: November 27, 2015

14 **THE LAW OFFICES OF TODD M. FRIEDMAN**

15 By: Todd M. Friedman
16 TODD M. FRIEDMAN, ESQ.
17 ATTORNEY FOR PLAINTIFFS

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is The Law Offices of Todd M. Friedman, P.C., 324 S. Beverly Dr., Suite 725, Beverly Hills, California 90212. On November 27, 2015, I served the within document(s):

**PLAINTIFF ALEXIOS KAFATOS' OPPOSITION TO DEFENDANT
UBER TECHNOLOGY, INC.'S MOTION FOR STAY OF
PROCEEDINGS**

- were served on all parties or their counsel of record named below by serving a true and correct copy in the manner indicated.

James G. Snell
PERKINS COIE LLP
505 Howard St., Ste. 1000
San Francisco, Ca 94105
jsnell@perkinscoie.com

13 ECF – I caused the above document(s) and all supporting papers to be
14 served on all counsel named above through the ECF system.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 27, 2015, at Beverly Hills, California.

/s/ Todd M. Friedman
TODD M. FRIEDMAN